NO 82-973

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

PETITIONER,

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMNESTY INTERNATIONAL USA, As Amicus Curiae IN SUPPORT OF REVERSAL

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NO 82-873

IMMIGRATION AND NATURALIZATION SERVICE,

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PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
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INTEREST OF AMICUS CURIAE

Amnesty International USA ("AIUSA") is one of over 40 national sections of Amnesty International ("AI"), a world-wide human rights organization with over 3,000 local groups and over 500,000 members, subscribers and supporters in over 150 countries and territories

around the the world. AI and AIUSA are independent of any government, political grouping, ideology, economic interest or religious creed. AI and AIUSA work to obtain the release of prisoners of conscience -- men and women detained anywhere for their beliefs, color, sex, ethnic origin, language or religion, provided they have not used or advocated violence. In 1977 AI received the Nobel Peace Prize for its human rights work.

AI and AIUSA have a direct interest in the status of refugees around the globe. Refugees who are returned to countries in which there is reason to believe they may be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion may become tomorrow's prisoners of conscience. AIUSA urges this Court to decide that

the "clear probability" test applied by the INS over the years has been superceded by the international "well founded fear of persecution" standard embodied in Article 33 of the Convention, on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention") as it has been incorporated in the United Nations Protocol relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No 6577 ("Protocol"), and in the Refugee Act of 1980, P. L. No 96-212, 94 Stat. 102 et seq ("Refugee Act").

AIUSA participated in the legislative process which led to the passage of the Refugee Act of 1980 and it urges this Court to reject the Government's contention that the incorporation of the international principle of "non-refoulement" in the Refugee Act of 1980 was

merely a public relations gesture without domestic effect. The long legislative process which led to the passage of the Refugee Act of 1980 was not animated by such cynical motivations. The legislative record is replete with the congressional intent to bring United States immigration law into conformity with our international obligations.

AIUSA has played a supportive role in the litigation of "non-refoulement" and asylum claims in administrative and court proceedings throughout the United States. Although AIUSA is seldom able to express an opinion about the validity of a particular applicant's fear of persecution, it has provided research materials concerning the human rights situation in various countries in the world which have been used by the INS and the courts in evaluating such claims.

See, e.g., Fernandez-Roque v. Smith, 539 F.Supp. 925 (N.D. Ga 1982); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977).

AI materials are prepared by AI's International Secretariat in London which examines and reports on human rights conditions in all countries. In the case of Yugoslavia AI prepared various materials relied on by the respondent in the proceeding below. Moreover, in 1982 AI published a 44 page report concerning prisoners of conscience in Yugoslavia which contains information directly relevant to respondent's claim that he fears persecution because of his political views if he returns to Yugoslavia.

These materials provide ample support for Respondents' fear that he will be persecuted if he is returned to

Yugoslavia, which is all the principle of "non-refoulement" requires.

INTRODUCTION AND SUMMARY OF ARGUMENT

The complicated procedural history of the proceedings below is not at issue in this Court. The sole question presented is whether the Refugee Act modified the standard an alien must meet in order to avoid deportation on the ground that he fears persecution in the country of deportation. More precisely, the issue of whether an alien claiming a "well-founded fear of persecution" must prove based on objective evidence that there is a near certainty that he "would be" persecuted or whether it is sufficient that an alien demonstrate that his subjective fear of persecution is supported by some objective evidence which

is sufficient to show that his fears are "well-founded."

The resolution of this issue is not a matter of semantics. This Court's decision will have a dramatic impact on aliens seeking relief from deportation or asylum and on United States compliance with its international obligations. If the INS position is accepted, it will continue to be difficult for aliens to obtain relief from deportation unless they can prove by objective evidence that there is a prison cell or a bullet reserved for them in the receiving country. If the Second Circuit's decision is affirmed the INS will be forced to assess realistically the charges that an alien may be persecuted and to implement the principle of "non-refoulement" in all appropriate cases. This case is a good example of the practical signifi-

cance of the different standards.

The respondent alleged that he feared persecution if he was returned to Yugoslavia because of his close affiliation with Ravna Gora--an anti-communist emigre organization active in the Chicago area where respondent has resided during his period of residence in the United States. Respondent supported this claim with documentary evidence of his affiliation with Ravna Gora and with newspaper clippings concerning conditions in Yugoslavia. He also relied on the fact that his father-in-law had been imprisoned for his anti-communist activities when he visited Yugoslavia in 1974 as a tourist, even though he was an American citizen. Later in the proceedings respondent submitted additional materials, including AI reports on conditions in Yugoslavia, and affidavits of indivi-

dual Yugoslavs who testified that respondent would be imprisioned if he were returned to Yugoslavia.[1] The above evidence was rejected by the Board of Immigration Appeals because the articles submitted by respondent, including AI materials, were "of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to the respondent" and because the affidavits and petitions submitted by individual Yugoslavs "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in

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1. It must be emphasized that the issue of whether respondent should have filed for asylum or relief from deportation or should have introduced the above materials at an earlier time in the proceedings is not at issue before this Court.

Yugoslavia." INS Brief, at 5-6.

Amicus submits that this decision is merely a euphemism for the Petitioners' position that it has absolute discretion to deny the right of "non-refoulement" to any alien. The international principle of "non-refoulement" was meant to apply equally to all applicants for refugee status. Few refugees can meet the nearly impossible standard described by the Board and implemented by the INS in countless cases. There is no Freedom of of Information Act in Yugoslavia which respondent might have invoked to support his claim. Only his imprisonment upon his return to Yugoslavia would satisfy the INS standard, but, of course, by then it would be too late. At that point, respondent is more likely to be an AI prisoner of conscience and of no concern to the INS.

The AI materials relied upon by respondent in the proceedings below demonstrate how "well-founded" respondent's fear of persecution is, notwithstanding the INS decision to the contrary.[2] Persecution in Yugoslavia on account of political beliefs contrary to official government positions is conducted based upon an elaborate legislative scheme of political repression.[3] In particular Article 133 of the Federal Criminal Code prohibits "Hostile Propaganda" in terms so broad that respondent's

2. The following discussion is based upon a 1982 AI report entitled "Yugoslavia: Prisoners of Conscience" ("AI report") which incorporates most of the AI information relied upon by respondent in the proceedings below.

3. The repressive legislation in Yugoslavia is also outlined in the State Department's annual human rights country reports which are in part based upon the AI reports relied upon by respondent in the proceedings below. See, e.g., the February 2, 1981 report, at 925-929.

activities with Ravna Gora seem to fall squarely within this expansive net.[4] Other legislation prohibits "counter-revolutionary endangering of the social order," "endangering the traditional unity" and "association for the purpose of hostile activity." AI Report, at 16-21.

The "hostile activity" law is perhaps the most serious threat to respondent if he is returned to Yugoslavia. Article 131 of the Criminal Code provides that:

> "A Yugoslav national who with intent of engaging in hostile activitiy against his country enters into contact with a foreign or refugee organization or group of persons, or aids them in performance of hostile activities shall be punished by imprisonment for a minimum of one year."

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4. The text of Article 133 is set forth in Appendix A.

This is not an idle threat. In the past year at least four persons returning to Yugoslavia from the United States have been arrested for violating the "hostile activity" law.[5] Two of these persons (from Beloit, Wisconsin) were sentenced to eight years and five years imprisonment, respectively, based upon their participation in demonstrations in the United States.

AI has adopted numerous prisoners of conscience in Yugoslavia who have been convicted of violating the "hostile propaganda" and "hostile activity" laws. These prisoners have been convicted on the basis of private conversations, of authorship of literary works, films and

5. These arrests and the convictions of two returning Yugoslavs, including one U.S. citizen, were reported in the Chicago Tribune on June 11, 1983, and in the European press. These are only some of the examples of persecution in AI's files.

pamphlets, of authorship of letters or articles which were published abroad. Other prisoners of conscience have been convicted for possessing, bringing into Yugoslavia or circulating emigre journals. AI Report, at 13-16.

It appears beyond dispute that respondent has already violated Yugoslavia's "hostile propaganda" and "hostile activity" laws and that he will be imprisoned if he is returned to Yugoslavia. At a minimum, respondent's subjective fear of persecution based upon his anti-communist activities is clearly supported by an objective reality of persecution in Yugoslavia that makes respondent's fear well-founded."

AIUSA makes three arguments in support of respondent's position. First, AIUSA contends that the international "well-founded fear" standard

requires only that an applicant for refugee status demonstrate a subjective fear of persecution which is supported by an "objective situation" in the receiving country.[6] Second, AIUSA contends that Congress intended to incorporate this international standard in the Refugee Act. Finally, AIUSA contends that the "clear probability" standard, as it has been applied by Petitioner, is inconsistent with the international "well founded fear" standard. For these reasons, the Second Circuit's judgment should be affirmed and Petitioner should be required to apply the

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6. The UNHCR and AILA discuss the development and content of the international standard contained in the Convention and Protocol, as well as the practice of states in implementing this standard. AIUSA joins in these portions of the UNHCR and AILA briefs.

international "well-founded fear standard, as this standard has been incorporated in the Refugee Act.[7]

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7. The Lawyers Committee for International Human Rights sets forth the legislative history of the Refugee Act and the unmistakable Congressional intent to incorporate the international standard in U.S. domestic law. AIUSA joins in this discussion.

ARGUMENT

THE REFUGEE ACT OF 1980 REQUIRES THE IMMIGRATION AND NATURALIZATION SERVICE TO APPLY THE INTERNATIONAL "WELL-FOUNDED FEAR" STANDARD AND NOT THE "CLEAR PROBABILITY" STANDARD IN MAKING DECISIONS UNDER 8 U.S.C. SECTION 1253(h)(1)

A. The International "Well Founded Fear" Standard Requires Only That An Applicant For Refugee Status Have A Subjective Fear of Persecution That is Supported by an "Objective Situation" in the Receiving Country

1. The UNHCR Handbook Embodies the International "Well-Founded Fear" Standard.

The best explanation of the "well-founded fear of persecution" standard is to be found in the "Handbook on Procedures and Criteria for Determining Refugee Status" ("Handbook") published by the United Nations High Commissioner for Refugees ("UNHCR") in 1979. The UNHCR is the U.N. body charged in Article 35(1) of the Convention with the "duty

of supervising the application of the provisions" of the Convention. In Article II (1) of the 1967 Protocol the United States has undertaken to cooperate with the UNHCR in the exercise of its functions. Petitioner denies the binding legal force of the Handbook, though it has in the past endorsed the use of the Handbook in administrative proceedings. See, e.g., In Re Frentescu, Int Dec. No. 2906 (1982); In re Rodriguez-Palma, 17 I&N Dec 465 (1980).

The Handbook emphasizes the primacy of the subjective element of the "well-founded fear of persecution" standard:

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

Of course, the applicant's subjective fear must be "supported by an objective situation." Handbook, ¶38. However, the applicant need not demonstrate that he will be persecuted if returned to his country of origin. Id. As the UNHCR emphasized:

> These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well founded . . . Handbook, ¶43.

The international "well founded fear" standard is premised on the reality that applicants will seldom be able to offer "objective" evidence that they will be persecuted if they are returned to their countries. Therefore, a subjective fear of persecution supported

by an "objective situation" of persecution in the receiving country suffices under this standard to clothe the applicant with the protection of international law.

2. The Handbook's Definition of "Well-Founded Fear of Persecution" is Based Upon the Plain Language of the Convention, the Travaux Preparatoires, and three decades of state practice.

The term "well founded fear of persecution" on its face is plainly in harmony with the standard described in the UNHCR Handbook and is in conflict with any standard which requires an applicant, as a practical matter, to prove that he will be persecuted if returned to his country of origin.[8] The

8. The Vienna Convention on the Law of Treaties, signed April 24, 1970, entered in force January 27, 1980, ___ U.S.T.S. ___, provides in Article 31(I) that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

plain language is supported by a drafting history and state practice. AIUSA will not recount this history or state practice, but a brief account of the travaux preparatoires leading to the definition of "refugee" in the 1951 Convention underscores the point.

The 1951 Convention arose in the context of a refugee crisis of global proportions in the aftermath of World War Two. Early on the international community adopted the principle that no refugee with "valid objections" would be compelled to return to their country of origin. U.N. G.A. Res A/64, at 12. (1946). This principle was embodied in the Constitution of the International Refugee Organization ("IRO") the U.N. organ responsible for refugee assistance activities from 1947 to 1952. See generally Goodwin-Gill, "Entry and

Exclusion of Refugees," in Michigan Yearbook of International Law (1982).

In 1949 the U.N. Economic and Social Council appointed an Ad Hoc Committee on Statelessness and Related Problems to prepare "a revised and consolidated convention relating to the international status of refugees" ECOSOC Resolution 248 (IX) (August 8, 1949). In the meantime, the U.N. General Assembly created the UNHCR as the successor to the IRO and as the body which would supervise the implementation of any conventions pertaining to refugees. The early drafting of the 1951 Convention was accomplished by the Ad Hoc Committee in January and February, 1950. Various draft proposals for a definition of "refugee" were made but none of these proposals would have required an applicant to demonstrate that he "would" be

persecuted. An early British draft defined "refugees" as persons who:

> "do not enjoy the protection of the State either because the State refuses them protection, or because for good reasons (such as, for example, serious apprehension based on reasonable grounds, of political, racial or religious persecution in the event of their going to that State) they do not desire the protection of that State.

U.N. Doc. E/AC.32/L.2 1(January 17, 1950.) (emphasis added). The next British proposal introduced the "well founded fear" terminology, but did not suggest even remotely a requirement that an applicant demonstrate persecution with near certainty:

> " . . . a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is

not allowed . . . to return there."

U.N. Doc E/AC.32/L.2 Rev. 1, (January 19, 1950) (emphasis added).

The French draft proposal defined a "refugee" as a person who ". . . refuses to return . . . owing to a justifiable fear of persecution." U.N. Doc E/AC 32/L.3 (January 17, 1950). The draft proposal of the United States contains no objective element in the definition of "refugee" at all. The first provisional draft of the Ad Hoc Committee as a whole defines a "refugee" as:

"2. Any person who (i) is outside the country of his nationality, former nationality or former habitual residence owing to persecution, or well-

> founded fear of persecution, for reasons of race, religion, nationality, or political opinion, and (ii) is unable or for valid reasons unwilling to avail himself of the protection of anyone of the said countries, and (iii) belongs to one of the following categories . . ."

U.N. Doc. E/AC.32/1.6 and Corr. 1, January 23, 1950 (emphasis added).

The Ad Hoc Committee's final draft of Article 1A(1) is substantially similar to Article 1A(2) of the 1951 Convention. U.N. Doc E/AC. 32/5 (February 17, 1950). The Ad Hoc Committee made two interprative comments regarding the meaning of "well-founded fear." First, in its draft report the Committee noted that:

> The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecu-

> tion or can give a plausible account why he fears persecution.

U.N. Doc E/AC.32/L38, at 33. (February 15, 1950) Second, in its final report the Committee comments:

> The expression "well-founded fear . . ." means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.

U.N. Doc E/AC.32/S, Annex IV, at 39 (February 17, 1950). Therefore, according to the Ad Hoc Committee a "refugee" is a person who can "give a plausible account why he fears persecution or who can "show good reason why he fears persecution." Neither of these formulations requires an applicant to demonstrate a near certainty or even a proba-

bility of persecution.

B. Congress Incorporated the International "Well Founded Fear" Standard in the Refugee Act. The "Well Founded Fear of Persecution" Standard and the "Clear Probability" Standard Are Not Identical; the "Clear Probability Standard Because it Requires Proof of a Near Certainty of Persecution is Inconsistent With the Refugee Act.

Congress substantially changed this country's immigration laws with the enactment of the Refugee Act. Significantly, Congress enacted in the Refugee Act for the first time a definition of "refugee" based principally upon the 1967 Protocol, which had incorporated the definition of "refugee" contained in the 1951

Convention.[9] Thus, the international "well-founded fear" standard was an integral part of the legislative mandate in the Refugee Act.

Significant also was Congress's total rewriting[10] of Section 243(h) which now reads:

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9. Section 201(a)(42) of the Act, 8 U.S.C. §110(a)(42) provides:

> The term refugee means (A) any person who is outside any country of such person's nationality . . .and who is unable or unwilling to return to . . .that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, . . .(emphasis supplied).

10. Before 1980, the Attorney General was:

> "authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationalality, membership in a particular social group, or political opinion. (Emphasis supplied.)

Thus, the new § 243(h) eliminates the Attorney General's discretion "to withhold deportation," and concerns itself with threats to life or freedom rather than with the certainty of persecution, and adds nationality, and membership in social groups, as classes of protected aliens.

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political opinion and for such period of time as he deems to be necessary for such reason." 8 U.S.C. § 1253(h). Congress amended Section 243(h) in 1965 by substituting "persecution on account of race, religion, or political opinion" for the original characterization, "physical persecution."

The apparent genesis of the "clear probability" standard is Lena v. INS, 379 F.2d 536 (7th Cir. 1967). In that case, the court observed, without any citation to authority, that:

> [T]he Attorney General employs stringent tests and restricts favorable exercise of his discretion to cases of clear probability of persecution of a particular individual petitioner. 379 F.2d at 538.

Furthermore, the court noted that because the decision to withhold deportation was within the discretion of the Attorney General, the standard for judicial review was whether there had been an abuse of discretion by that officer or his designee. Id. at 537.

The Lena court's "clear probability" test was cited with approval later that year in Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967). Since

1967, both Lena and Cheng Kai Fu have routinely been cited by other courts invoking the "clear probability" standard. Since Lena the courts have occasionally used somewhat different formulations of the test, but whether the alien's burden is proof of a "probability" of persecution (Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)), or "objective evidence that the alien will be persecuted" (Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1982)), what the courts have consistently tried to determine is whether persecution "would" result from the deportation decision. Indeed, the failure of an alien to offer evidence that "he would in fact be persecuted" (Kashani, 547 F.2d at 380) upon his deportation is an example of how the "clear probability" standard focuses upon the ability of the INS to predict

with near certainty whether a future event will occur, rather than treating the alien as one with a protectable interest as long as his bona fide fear of persecution is based upon objective data which render the fear a "well-founded" one.

Petitioner concedes that § 243(h) forbids deportation of an alien who proves his "fear of persecution" is "well-founded." INS Brief, at 20. However, Petitioner contends that Congress, when it enacted the Refugee Act, intended no change in the standard by which such proof is to be judged, and so the 1967 Lena test still applies to §243(h) decisions. The entirety of that argument depends upon the asserted ambiguity of the relevant provisions of the Act, and of the legislative intent which Petitioner says is indicative that

Congress did not intend to change the judicially-created "clear probability" test--a test which was used to give effect to the now eliminated discretion of the Attorney General under old § 243(h). Petitioner is simply wrong.

First, whether Congress thought of "well-founded fear" as the equivalent of "clear probability" cannot be determined from the legislative history of the Act which contains no mention of the subject. Neither do the Committee references to § 243(h) support the Petitioner's view. For example, Petitioner quotes at length from the 1979 House Report dealing with an earlier version of the 1980 Act. INS Brief, at 37-38. The reference therein to § 243(h) states in part:

> Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33

> [prohibiting the return of a refugee to a place where his life or freedom would be threatened on account of political beliefs], the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality membership in a particular social group, or political opinion.

H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979).

It is likely that the reference to § 243(h) as having "been held by court and administrative decisions to accord aliens the protection required under Article 33" is to In re Dunar, 14 I&N Dec. 310 (BIA 1973). In Dunar, the Board of Immigration Appeals opined that because the Attorney General had never

failed to exercise his discretion to withhold the deportation of an alien who the Attorney General believed "would be persecuted," the "mandatory quality" INS Brief, at 29, n.29) of Article 33 did not require a change in the application of old § 243(h). Clearly, Congress was aware of the view expressed by the Board in Dunar and by the Petitioner herein but nonetheless completely rewrote § 243(h) because the "change in Section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. Rep. 96-608, supra, at 18 (emphasis added).

The change in the language of § 243(h) was not, as the Petitioner suggests, trivial; nor was it simply for cosmetic purposes. Indeed, even the Dunar decision, the case principally

relied upon by the Petitioner for the proposition that the U.S. accession to the 1967 Protocol effected no change in determination under § 243(h), fails to support Petitioner's position. The Dunar Board was confronted with the question whether the Attorney General's discretion pursuant to § 243(h) had been eliminated because the Protocol, while not purporting to amend § 243(h), incorporated the 1951 Convention, Articles 1 and 33 of which appeared to prohibit the discretion conferred by § 243(h) at the time.

Although Article 33 prohibits the return of a refugee to a country "where his life or freedom would be threatened" on account of race, religion or politics, the authority conferred by § 243(h) permitted the Attorney General to exercise his discretion in favor of deporting

refugees who faced persecution. Thus, §243(h) was clearly in conflict with the language of the Protocol. The Board in Dunar acknowledged the fact that the law had changed, but said that the practice of the Attorney General was "not in conflict" with the new requirements of the Protocol because no alien who had proven he would be persecuted upon deportation to a particular country had ever been deported. Id. at 321-323. Thus, Petitioner's argument that no change in law was effected by the Protocol is demonstrably incorrect because the Attorney General's discretion was, in fact, legislatively eliminated and his "practice" became obligatory.

Dunar was also concerned with whether the "well-founded fear" formulation required by the Protocol affected the previously used "clear probability"

standard. While the Board found the language differences "reconcilable" and "compatible," it cited with approval the report of the Ad Hoc Committee which had framed the "well-founded fear" provision and quoted the definition in that report: "well-founded fear" means that the "person has either been a victim of persecution or can show good reason why he fears persecution." Id. at 319-320. In Dunar the Board was faced with a claim that the applicant's "own state of mind . . . is the primary test" and evidence from the applicant which focused almost exclusively on subjective fear of persecution. The Board found no difficulty in denying that accession to the Protocol had worked so fundamental a change that an applicant's mere conjecture would justify the "well-founded fear" standard. Id. at 319. As with so many

cases relied upon by Petitioner, however, Dunar's seeming willingness to accommodate the "well-founded fear" standard to the old "clear probability" standard provides no substantial support for Petitioner's position because there was no evidence in those cases that the applicant's fear of persecution had any objective basis. E.g., Gena v. INS, 424 F.2d 227 (5th Cir. 1970); Sodeghzadeh v. INS, 393 F.2d 894 (7th Cir. 1968); Shkukani v. INS, 435 F.2d 1378 (8th Cir. 1971).

Since the Board's decision in Dunar, several courts have recognized that the United States accession in 1968 to the Protocol effected changes in our immigration laws. Indeed, the viability of the "clear probability" standard was seriously questioned by the courts after 1968 and before the enactment of the 1980 Refugee Act. For example in

Coriolan v. INS, 559 F.2d 993, 997 (5th Cir. 1977), the court stated that, notwithstanding Dunar's conclusion that old § 243(h) was applied consistently with the requirements of Article 33 of the Convention, it was an open question whether the Attorney General's discretion to order deportation after a finding of likely persecution would violate our obligation under the Protocol. See also Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1982) (the "well founded fear" and "clear probability" standards are different but "will in practice converge").

The choice of tests will not affect the outcome in some cases and so whether the two approaches "converge" or not is unimportant in such instances. For example, where the alien's evidence is disbelieved or where there is no rational basis to conclude that the alien might

suffer persecution if deported, it makes no difference whether the "clear probability" test is used or whether the "well-founded fear" formulation is employed. On the other hand, if an alien has good reason to believe that he will be persecuted for his political beliefs upon deportation but is unable to prove that he "will be" persecuted, it matters greatly which test is used, and it matters not at all to that alien whether the two different approaches "will in practice converge." Likewise, the Coriolan court noted that the alien's burden of proving a "well-founded fear" was less than the burden under the "clear probability" test. 559 F.2d at 997. This case is a perfect example of a situation in which the result depends on which test is employed.

Faced with the question whether the

Act's elimination of the Attorney General's discretion to withhold deportation, and its mandate that the Attorney General "shall not" deport an alien with a well-founded fear of persecution, worked any change in the standard for review of the INS finding that persecution was not likely to result, the court in McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) observed:

> The new § 243(h) removes the absolute discretion formerly vested with the Board. A factual determination is now required and the Board must withhold its deportation if certain facts exist. This change requires judicial review of the Board's factual findings if the 1980 Amendment to § 243(h) is to be given full effect. Agency findings arising from public record-producing proceedings are normally subject to the substantial-evidence standard of review. [Citations]. The INS does not cite any portion of the legislative history of the 1980 Amendment which suggests that, contrary to normal

principles of administrative law, § 243(h) factual findings are discretionary.

The court concluded that the 1980 amendment to § 243(h) required a change to the standard for review of Board findings. Noting that the old § 243(h) permitted the withholding of deportation at the discretion of the Attorney General and that the court had previously applied the abuse of discretion standard to such decisions, the court concluded that the elimination of the Attorney General's discretion required such decisions now to be reviewed by the substantial evidence standard. Id. Holding that the INS's finding that the alien would not likely be subject to persecution was not supported by substantial evidence, the court granted the alien's petition for review. Id. at 1319.

Thus, contrary to the INS' argument

that it is "business as usual," a significant change affecting the review of § 243(h) decisions has resulted from the 1980 Act becoming law. Consequently, the argument that new and old § 243 are equivalents is incorrect.

Since the 1968 accession to the Protocol with its definition of refugee as one who has a "well-founded fear" of persecution, several courts have indicated a willingness to liberalize the "clear probability" standard even while reciting Petitioners' argument (before this Court and in Dunar, supra), that the two formulations can be reconciled. Other cases have suggested that the "clear probability" test remains essentially concerned with accurate predictions of the behavior of foreign governments. E.g., Kashani, supra.

At best, then, there is confusion

in the cases as to what is the proper standard and how to articulate it. Part of that confusion results from unpersuasive attempts to equate the "well-founded fear" language with the stringent requirements of the "clear probability" test. Compounding that confusion is Petitioners' argument that because the "well-founded fear" formulation requires objective evidence to validate the alien's state of mind, there is no difference between that standard and the "clear probability" standard because the latter also requires objective evidence that the alien "will be" persecuted if deported. The argument is a non sequitur. Clearly, the fact that "objective" evidence may be required under both formulations does not help decide whether the burden is greater for one than the other. Thus, the inquiry

neither begins nor ends with the conclusion that both formulations have objective components.

Indeed, it is misleading in another sense to argue that both tests have objective components. A major distinguishing feature between "clear probability of persecution" and "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion," is the nature of the evidence is the nature of the evidence required in order to satisfy each standard and for the alien thereby to become statutorily eligible for the withholding of deportation. As pointed out by the Second Circuit below (678 F.2d at 405-406), when discussing the Handbook on Procedures and Criteria for Determining Refugee Status, "well-founded fear" has

both subjective and objective elements: "The applicant's state of mind is thus relevant, as are conditions in the country of origin, its laws, and experiences of others. Although there may be difficulty involved in using evidence pertaining to the "experiences of others"in a beneficial manner,[11] "clear probability tends to focus almost exclusively on the objective component.

11. See, e.g., Paul v. INS, 521 F.2d 194, 200-201 (5th Cir. 1975)("The suicide of one [Haitian . . . after receipt of Notice of Deportation] and attempted suicide of another is not, without more, and contrary to petitioner's contention, evidence of their fear or indicative that their fear is well-founded . . . ."); Rosa v. INS, 440 F.2d 200 (1st Cir. 1971); Zamora v. INS, 534 F.2d 1055 (1976); McMullen v. INS, 658 F.2d 1312, 1317 (9th Cir. 1981) ("The Board found that . . . the articles and reports generally documenting [Provisional Irish Republican Army] terrorism were irrelevant because they did not refer specifically to persecution directed at McMullen.")

The "clear probability" test, for example, and through it the Board, despite references to persecution as encompassing a threat, is much more interested in persecution as a physical fact:

> Some sort of a showing must be made and this can ordinarily be done by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted.

Dunar, 14 I&N Dec. at 319. See, also, Paul v.INS, 521 F.2d 194, 196-197 (5th Cir. 1975)("In order to qualify for discretionary witholding of deportation, the applicants must prove their departure from Haiti was politically motivated and that on return they face persecution for reasons political in nature."); McMullen v.INS, 658 F.2d 1312, 1317 (9th Cir. 1981) ("The Board found that McMullen's personal

testimony was not credible because it was self-serving . . . ." Rejaie v. INS, 691 F.2d 139, 144, 147 (3rd Cir. 1982) ("Therefore, we must conclude that petitioner did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land"); and Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983).

What these cases also demonstrate is a confusion of concepts. The subjective component of "well-founded fear" refers most particularly to "the applicant's state of mind" (Stevic, 678 F.2d at 406), not just to the applicant's testimony, which may consist of both subjective and objective narration. Those using what amounts to a "clear probability" test (e.g., Paul v. INS, supra; Rejaie v. INS, supra; Matter of

Dunar supra; Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967); Lena v. INS, 379 F.2d 536 (7th Cir. 1967)), equate objectivity only with the degree of documentation and corroboration of the applicant's testimony that he will be persecuted. A focus on subjectivity would be to focus, as did the Second Circuit below on the applicant's state of mind as revealed in the applicant's testimony and otherwise. The goal is credibility and the reasonableness of a state of mind allegedly dominated by fear of persecution or "a desire to avoid a situation entailing the risk of persecution' . . ." (Stevic, 678 F.2d at 406). The objective component is that the "fear" must be "well-founded" i.e., rational and reasonable, and this cannot absolutely depend upon the degree of supporting documentation, which is often

unavailable to the applicant.

While the cases are often confused about the proper standard to apply and about the method of the standard's application, what is clear is that one meaning commonly ascribed by the courts and the INS to the "clear probability" standard is that the alien must prove that he will in fact be subject to persecution if deported to a particular country. See, Kovac v. INS, supra; Rejaie v. INS, supra. That some courts apparently have concluded that the "well-founded fear" test can be satisfied by evidence which is more than the mere conjecture of the alien that he will be persecuted, and that such a minimal standard is consistent with the "clear probability" formulation (e.g., Kashani supra), does not resolve the issue. In other words, the fact that there are

some cases invoking the "clear probability" formulation that have apparently applied a more liberal standard than other cases means only that there is no standard consistently applied in cases involving persecution claims.[12] Thus, Petitioners' "equivalence" argument is impossible to verify because the standard is a "moving target." While Petitioner makes it difficult to keep track of the pea, that diversion is insufficient basis upon which to conclude that Congress intended no more than to dress-up our immigration laws for public relations purposes.

12. The INS assertion that the two tests "have always been equivalent" (INS Brief at 49) and that the "clear probability" standard has been "consistently employed" (Id. at n.46), are necessary to its argument that no change in the standard was effected by the Act. Because the premise is demonstrably incorrect, the INS's conclusion is supported only by self-serving administrative decisions.

Petitioner's position that nothing changed with enactment of the Refugee Act flies in the face of reason. To say that "conjecture" only, with no support, will not suffice for statutory eligibility, as the Third Circuit did in Rejaie v. INS, 691 F.2d 139 (3rd Cir. 1982), and Marroquin-Manquez v. INS, 699 F.2d 129 (3rd Cir. 1983), does not advance the ball because mere "conjecture" does not suffice under the "well-founded fear" standard either. The fact is that the "clear probability" and "well-founded fear" tests are different standards -- even if some courts have equated them -- and that the well-founded fear" standard was adopted by Congress in the Refugee Act. The changes enacted in 1980 have been recognized by the Second Circuit and by other courts as well. See McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981);

Bertrand v. Sava, 684 F.2d 204 (2nd Cir. 1982); Almirol v. INS, 550 F.Supp. 253 (N.D. Calif. 1982); and Reyes v. INS, 693 F.2d 597 (6th Cir. 1982) (which specifically agrees with Stevic that "clear probability" is too stringent and that the "well-founded fear" test is the appropriate standard).

Finally, this Court should conclude that the 1980 Act changed the standard of proof for an applicant seeking to avoid deportation under § 243(h) because the Act requires that a uniform test of "refugee" be applied to all aliens, thereby eliminating the previous distinction between aliens seeking to enter this country as refugees under old § 203(a)(7) and deportable aliens already in this country seeking eligibility under the old § 243(h). Under the old law, aliens seeking admission as refugees

under § 203(a)(7) could be awarded conditional entries by the Attorney General upon proof of a "fear of persecution on account of race, religion, or political opinion," provided they were fleeing certain countries. The Board "fear of persecution" standard seems much less onerous than what the INS and the courts have held to be sufficient evidence to meet the "clear probability" test previously in use. Recognition by the Board in Matter of Tan that the "clear probability" test is more stringent compels the conclusion that "well-founded fear" is more closely analogous to "good reason to fear" than it is to "clear probability" that the alien will be persecuted if deported. Because the 1980 Act eliminates the distinction between aliens seeking to avoid deportation and aliens seeking admission and

mandates a uniform test of "refugee" to be applied to either category of alien, it would indeed be anomalous, as the Stevic court observed, if the 1980 Act recognized that the legal standard under § 203(a)(7) was much less stringent than the "clear probability" test employed by the Board in evaluating applications for withholding under § 243(h). Matter of Tan, 12 I&N, Dec. 564 (1967). If the alien could show "good reason" for such fear, he met the § 203(a)(7) standard. Matter of Ugricic, 14 I&N Dec. 384, 385-386 (1972). "Good reason" to fear persecution sufficient to meet the requirements of Section 203(a)(7) is the same test, phrased in the same words used by the authors of Article 33 of the Convention, the language of which was adopted by Congress in Section 201(a)(42) of the 1980 Act defining the word

"refugee."

Intuitively, the proof necessary to demonstrate a "good reason" for having a fear of persecution seems much less onerous than what the INS and the courts have held to be sufficient evidence to meet the "clear probability" test previously in use. Recognition by the Board in Matter of Tan that the "clear probability" test is more stringent compels the conclusion that "well-founded fear" is more closely analogous to "good reason to fear" than it is to "clear probability" that the alien will be persecuted if deported. Because the 1980 Act eliminates the distinction between aliens seeking to avoid deportation and aliens seeking admission and mandates a uniform test of "refugee" to be applied to either category of alien, it would indeed be anomalous, as the

Stevic court observed, if the 1980 Act were to be interpreted as increasing the burden for the category of aliens previously covered by Section 203(a)(7) by imposing on them the "clear probability" standard of old 243(h) rather than the "good reason to fear" standard applicable to them before 1980.

Petitioner attempts to belittle the Stevic analysis by adverting to the small numbers of aliens covered by old § 203(a)(7) and by arguing that an enhanced burden on those aliens would be consistent with the purposes of the 1980 Act. The argument is simply another example of Petitioner's attempt to walk both sides of the street. On the one hand, Petitioner contends that Congress intended no change in the test by which an applicant for refugee status is measured. On the other hand, Petitioner

asserts that Congress intended the test to be changed for a small number of aliens seriously subject to § 203(a)(7). Petitioner can not have it both ways. The answer, as the Stevic court noted, is that Congress clearly intended to give effect to the humanitarian purposes of the Convention and Protocol. It would be an anomalous judicial frustration of that purpose to impose on any class of refugees a more difficult burden than had previously existed without any evidence that Congress intended that result. Far more consistent with the history of the Act and its international genesis, together with the rather striking changes in language to § 243(h), is acceptance of the fact that the "well-founded fear" test, which Petitioner admits is the enacted formulation, is different from the court-

created and inconsistently-applied "clear probability" standard. The difference in the words themselves would seem to most to mean different things. But when it is understood that "clear probability" means proof that persecution will result, the apparent difference in the tests could hardly be more obvious.

CONCLUSION

This case exemplifies the differences between the "clear probability" standard employed by the INS and the international "well-founded fear of persecution" standard incorporated by Congress in the Refugee Act of 1980.

Petitioner's argument that the INS should be permitted to conduct business as usual can be accepted only if this Court finds that Congress had no intention of incorporating international standards into U.S. domestic law. "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v.Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). This court should take Congress at its word and find that the Refugee Act of 1980 requires

the INS to apply the international "well-founded fear of persecution" standard, as it is embodied in the UNHCR Handbook, and not the stringent, formless "clear probability" standard which has been employed by the INS over the years.

Respectfully submitted,

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*Pamela Dunn, Donald Green, Mary Andres, and Ken Gross, students at Southwestern University School of Law, provided valuable research assistance in the preparation of this brief.

APPENDIX "A"

Article 133 provides as follows:
"1) Whoever, by means of an article, leaflet, drawing, speech or some other way, advocates or incites the overthrow of the rule of the working class and the working people, the unconstitutional alteration of the socialist social system of self-management, the disruption of the brotherhood, unity and equality of the nations and nationalities, the overthrow of the bodies of social self-management and government or their executive agencies, resistance to the decisions of competent government and self-management bodies which are significant for the protection and defence of the country; or whoever maliciously and unthruthfully portrays socio-political conditions in the country shall be punished by imprisonment for from one to 10 years.
"2) Whoever commits an offense as mentioned in paragraph 1) of this Article with aid or under influence from abroad, shall be punished by imprisonment for at least three years.
"3) Whoever sends or infiltrates agitators or propaganda material into the territory of the SFRJ in order to perform an offense as mentioned in paragraph 1) of this Article shall be punished by imprisonment for at least one year.
"4) Whoever, with the intention of distribution, prepares or reproduces hostile propaganda material or whoever

has such material in his possession knowing that it is intended for distribution, shall be punished by imprisonment for at least six months and not more than five years."

AI Report, at 12-13.